Yong Hin Seong & Anor v Yong Teik Seong

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S2–24–2577 OF 2002
ABDUL MALIK ISHAK J
8 FEBRUARY 2003

Land Law *— Sale of land — Order for — Application pursuant to O 31 of the Rules of the High Court 1980 — Necessary and expedient for the purposes of the cause — Equitable principles — Power of court to direct a sale — Rules of the High Court 1980 O 31 — Courts of Judicature Act 1964 s 25(1), (2)*

The plaintiffs and the defendant are brothers who are the registered joint owners of a flat held under Block Title Geran No 24688 Lot No 266 Section 19 District of Wilayah Persekutuan Town of Kuala Lumpur and held equal $^{1}/_{12}$ shares in the property. Initially the three brothers were staying in the property but since 1975 only the defendant and his family occupied the property to the exclusion of the plaintiffs. The plaintiffs and the defendant had a verbal agreement that the defendant would pay the plaintiffs rental for the plaintiffs' $^{2}/_{12}$ share at the rate of RM330 per month. In 1995, both the plaintiffs had a change of heart and they requested for an increase in rental up to RM800 per month in order to reflect the market value. The defendant resented the increase in rental. The plaintiffs then filed a claim in the magistrate's court in order to obtain the outstanding rentals from the defendant and the defendant filed a counterclaim seeking a return of the rentals. The learned magistrate dismissed the defendant's counterclaim and allowed the plaintiffs' claim. The defendant appealed to the High Court but the appeal is yet to be disposed of. The defendant continues to stay at the property but has not been paying rental. To resolve this impasse the plaintiffs sought orders of the High Court for the sale of the property by way of public auction, that the defendant delivers vacant possession of the property to the successful bidder and that the proceeds of the sale be divided equally between the plaintiffs and defendant.

Held, granting, inter alia, the order for sale:

(1) The defendant could not be allowed to remain on the property and not pay rent and refuse to vacate the property. Equitable principles must be brought into the picture. Principles of equity are certainly wide and elastic and they can apply to new circumstances that may arise from time to time. The plaintiffs had not taken the law into their own hands. They sought legal redress before the magistrate's court. They also sought the High Court to adjudicate on their application in encl 1. The maxim that he who seeks equity must do equity has been complied with by the plaintiffs (see p 44F–G).

(2) The practical way and the only way to resolve the impasse between the plaintiffs and the defendant was to sell the property

by way of a court order and that the sale be effected by public auction. This was done in the case of *KK Kumaran v TS Sambanthamurthi* [1996] 3 MLJ 309 and *President Shoes Sdn Bhd v Macci Fashion Centre Sdn Bhd* [1998] 1 CLJ 169. It will be done in this case. The root words of O 31 of the Rules of the High Court 1980 would be attached to the words 'it appears necessary or expedient'. Those words must be the guiding force before the court makes an order that a particular property or part of it is to be sold. It is also a requirement that the court may order a sale of the property, like the present case, whenever it is necessary for the purposes of the action. Factually speaking, the impasse between the plaintiffs and the defendant as alluded to earlier made it 'necessary or expedient' for the High Court to order the property to be sold (see p 45B–F).

(3) Section 25(1) of the Courts of Judicature Act 1964 gives an unfettered jurisdiction to the High Court to deal with all matters vested in it immediately prior to Malaysia Day. While s 25(2) of the Courts of Judicature Act 1964 gives an unfettered and untrammeled jurisdiction to the High Court to exercise all the additional powers as set out in the Schedule thereto and these additional powers are certainly wide and very elastic subject only to the requirements that these additional powers shall be exercised in accordance with any written laws or rules of court relating to the same subject matter (see p 47C–E).

[Bahasa Malaysia summary

Plaintif-plaintif dan defendan adalah adik-beradik yang merupakan pemunya bersama satu rumah pangsa yang dipegang di bawah Block Title Geran No 24688 Lot No 266 Section 19 District of Wilayah Persekutuan Town of Kuala Lumpur dan mereka memegang $^{1}/_{12}$ bahagian sama di dalam hartanah. Pada mulanya, ketiga-tiga beradik menetap di hartanah itu tetapi bermula daripada 1975 hanya defendan dan keluarganya menetap di hartanah itu. Plaintif-plaintif dan defendan telah bersetuju secara lisan bahawa defendan akan membayar plaintif-plaintif sewa untuk $^{2}/_{12}$ bahagian plaintif-plaintif pada kadar RM330 sebulan. Pada 1995, kedua-dua plaintif telah menukar fikiran mereka dan mereka telah meminta kenaikan dalam sewa sehingga RM800 sebulan untuk membayangkan nilai pasaran. Defendan tidak bersetuju dengan kenaikan sewa. Plaintif-plaintif kemudiannya telah memfailkan satu tuntutan di dalam mahkamah majistret untuk menuntut sewa yang belum dijelaskan daripada defendan dan defendan telah memfailkan tuntutan balas menuntut sewa yang telah dibayar. Majistret yang arif telah menolak tuntutan balas defendan dan telah membenarkan tuntutan plaintif-plaintif. Defendan telah merayu kepada Mahkamah Tinggi tetapi rayuan itu masih belum diselesaikan. Defendan masih menetap di hartanah itu tetapi tidak membayar sewa. Untuk meyelesaikan masalah ini plaintif-

plaintif sekarang memohon perintah-perintah daripada Mahkamah Tinggi untuk jualan hartanah melalui lelong awam, bahawa defendan memberi milikan kosong hartanah itu kepada orang yang menawar yang berjaya dan untuk hasil kutipan hartanah itu dibahagikan serata di antara plaintif-plaintif dan defendan. A

Diputuskan, memberi, antara lain, perintah jualan: B

(1) Defendan tidak boleh dibenarkan untuk menetap di dalam hartanah itu dan tidak membayar sewa dan enggan mengosongkan tempat itu. Prinsip-prinsip ekuiti mesti dipakai di dalam kes ini. Prinsip-prinsip ekuiti adalah luas dan anjal dan boleh dipakai di dalam keadaan-keadaan baru yang boleh timbul daripada masa ke masa. Plaintif-plaintif telah bertindak mengikut undang-undang. Mereka telah mendapatkan penghakiman mahkamah dari mahkamah majistret. Mereka telah juga memohon kepada Mahkamah Tinggi untuk membuat keputusan mengenai permohonan mereka di dalam kandungan 1. Pepatah bahawa 'he who seeks equity must do equity' telah dipatuhi oleh plaintif-plaintif (lihat ms 44F–G). C D

(2) Cara yang praktik dan satu cara yang dapat menyelesaikan masalah di antara plaintif-plaintif dan defendan adalah untuk menjual hartanah itu melalui perintah mahkamah dan bahawa jualan itu dilaksanakan oleh lelong awam. Ini telah dilakukan di dalam kes *KK Kumaran v TS Sambanthamurthi* [1996] 3 MLJ 309 dan *President Shoes Sdn Bhd v Macci Fashion Centre Sdn Bhd* [1998] 1 CLJ 169. Ini akan dilakukan di dalam kes ini. Kata-kata dasar A 31 Kaedah-Kaedah Mahkamah Tinggi 1980 akan bersama dengan perkataan-perkataan 'it appears necessary or expedient'. Perkataan-perkataan itu mesti menjadi petunjuk sebelum mahkamah membuat perintah bahawa sesebuah hartanah atau sebahagian daripadanya akan dijual. Ia juga merupakan keperluan bahawa mahkamah boleh memerintahkan jualan hartanah, seperti dalam kes ini, apabila ia perlu untuk tujuan tindakan itu. Pada fakta-fakta, masalah di antara plaintif-plaintif dan defendan seperti yang dikatakan menjadikannya 'necessary or expedient' untuk Mahkamah Tinggi memerintah bahawa hartanah itu dijual (lihat ms 45B–F). E F G

(3) Seksyen 25(1) Akta Mahkamah Kehakiman 1964 memberi bidangkuasa tidak terlepas dari belenggu kepada Mahkamah Tinggi untuk membicarakan segala perkara yang diletakhak di dalamnya sebelum Hari Malaysia. Seksyen 25(2) Akta Mahkamah Kehakiman 1964 memberi bidangkuasa yang tidak terlepas dari belenggu dan tidak terhalang kepada Mahkamah Tinggi untuk menggunakan segala kuasa-kuasa tambahan seperti yang terdapat di dalam Jadual kepadanya dan kuasa-kuasa tambahan ini luas dan anjal dan hanya tertakluk kepada keperluan bahawa kuasa-kuasa tambahan ini perlu digunakan mengikut H I

undang-undang bertulis atau kaedah-kaedah mahkamah yang berkenaan perkara sama (lihat ms 47C–E).

Notes

For cases on order for sale of land, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 3582–3673.

Cases referred to:

Barnes v Barratt [1970] 2 All ER 483 (refd)
Doe d Pritchard v Dodd (1833) 5 B & Ad 689 (refd)
Fulcrum Capital Sdn Bhd v Dato' Samsudin Abu Hassan; Rahaz Sdn Bhd & Anor (Interveners) & Another Case [2001] 5 CLJ 73 (refd)
Hanson v Keating (1844) 4 Hare 1, 67 ER 537 (refd)
Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd [1989] 2 MLJ 149 (refd)
KK Kumaran v TS Sambanthamurthi [1996] 3 MLJ 309 (folld)
Lim Eng Kay v Jaafar bin Mohamed Said [1982] 2 MLJ 156 (refd)
Malayan Banking Bhd v Zahari Bin Ahmad [1988] 2 MLJ 135 (refd)
Mayfair Trading Co Pty Ltd v Dreyer (1958) 101 CLR 428 (refd)
Miles v Jarvis (No 2) (1883) 50 LT 48 (refd)
Montague v Browning [1954] 2 All ER 601 (refd)
Morgan d Dowding v Bissell (1810) 3 Taunt 65 (refd)
Pancaran Nilam (M) Sdn Bhd v Malayan Banking Bhd and another appeal [2000] 4 MLJ 625 (refd)
PhileoAllied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor [1999] 3 MLJ 157 (refd)
President Shoes Sdn Bhd v Macci Fashion Centre Sdn Bhd [1998] 1 CLJ 169 (folld)
Stratton v Pettit (1855) 16 CB 420 (refd)

Legislation referred to:

Courts of Judicature Act 1964 s 25, (1), (2), Sch to s 25(2)
Interpretation Acts 1948 and 1967 ss 3, 66
National Land Code ss 256, 257
Rules of the High Court 1980 O 31, O 83
Specific Relief Act 1950 s 11

Sivanesan P Suntheresan (*Amin-Tan & Co*) for the plaintiffs.
SY Lee (*ST Lee & Partners*) for the defendant.

Abdul Malik Ishak J: This was an application for an order for sale under O 31 of the Rules of the High Court 1980 ('the RHC') read together with s 11 of the Specific Relief Act 1950 (Act 137) and s 25 of the Courts of Judicature Act 1964 (Act 91) filed by the plaintiffs as seen in encl 1. In its original text, encl 1 was worded as follows:

(a) satu perintah daripada mahkamah yang mulia ini membenarkan plaintif-plaintif yang dinamakan di atas menjual sebuah hakmilik berdaftar harta berikut iaitu:

(i) hartanah yang dikenali sebagai No 37A, Tengkat Tong Shin, 50200 Kuala Lumpur yang dipegang di bawah Suratan Hakmilik Geran 24688, No Lot 266 Sek 19, Daerah Wilayah Persekutuan, Bandar Kuala Lumpur, Negeri Wilayah Persekutuan (selepas ini dirujuk sebagai 'Hartanah tersebut').

(b) bahawa defendan dan semua yang menuntut menerusi atau di bawah mereka yang dalam milikan/posesi atau penghunian kini meninggalkan dan menyerahkan milikan kosong kepada pembeli bangunan yang dibina atas tanah tersebut;

(c) bahawa tarikh jualan ditetapkan menjadi tarikh yang tidak kurang satu (1) bulan dari tarikh perintah;

(d) bahawa harga rezab dan tarikh seterusnya untuk arahan-arahan lain yang berkaitan agar jualan ditetapkan oleh Penolong Kanan Pendaftar Mahkamah Tinggi di Kuala Lumpur;

(e) bahawa kos bagi permohonan ini dan apa-apa yang berkaitan dengan permohonan dan jualan tersebut hendaklah dibayar oleh defendan kepada plaintif-plaintif di luar hasil jualan tersebut; (dan)

(f) mana-mana arahan selanjutnya yang difikirkannya patut dan dianggap adil oleh mahkamah yang mulia ini.

The defendant vehemently challenged the application for an order for sale as phrased and framed in encl 1.

Facts of the case

Both the plaintiffs and the defendant are brothers. The first plaintiff is the youngest being in the age group of 58 while the second plaintiff is aged 62 and the defendant is aged 60. They are no longer young and they are approaching their twilight years.

The squabbles between the siblings, as usual, revolve on a piece of property.

The plaintiffs and the defendant are the registered joint owners of a flat held under Block Title Geran No 24688, Lot No 266, section 19, District of Wilayah Persekutuan, Town of Kuala Lumpur and having a postal address at No 37A, Tengkat Tong Shin, 50200 Kuala Lumpur (the 'property'). Each of the three brothers held $^{1}/_{12}$ shares to the property.

Although the plaintiffs and the defendant are the registered owners of the property, only the defendant and the defendant's family are presently occupying the said property. In fact, initially the three brothers were staying in the property. But since 1975, only the defendant and his family members occupied the property to the exclusion of both the plaintiffs. To facilitate this mutual arrangement between the brothers, they had verbally agreed that the defendant is to pay to both the plaintiffs rental for the $^{2}/_{12}$ shares of both the plaintiffs at the rate of RM330 per month. This was the arrangement in 1975. It worked pretty well.

A In 1995, both the plaintiffs had a change of heart and they requested for an increase of rental up to RM800 per month in order to reflect the $^{2}/_{3}$ market value of RM1,200 at the material time. The defendant resented this increase in rental. The cordial relationship between the three brothers ended.

B The plaintiffs then filed a claim in the magistrate's court in order to obtain the outstanding rentals from the defendant and the defendant too filed a counterclaim seeking for the return of the rentals paid thus far. On 12 June 2002, the learned magistrate allowed the plaintiffs' claim and forthwith dismissed the defendant's counterclaim. The defendant has since filed an appeal to the High Court against the decision of the learned C magistrate. The appeal has yet to be disposed of.

There was an attempt to settle the matter amicably in the midst of the trial before the learned magistrate wherein the plaintiffs agreed to purchase the defendant's $^{1}/_{12}$ share in the property. But the settlement did not pull through because the defendant's solicitors had failed to approve the draft D sale and purchase agreement.

Even though the plaintiffs were successful in their litigation before the magistrate's court, yet the plaintiffs had not enjoyed the fruits of their success. The defendant continues to stay at the property with his family members and he has not been paying the rental either.

E To resolve the impasse, the plaintiffs now seek an order of this court for the sale of the property in question as per prayer (a) of encl 1 by way of a public auction. The plaintiffs too seek an order that the defendant surrenders vacant possession of the property as per prayer (b) of encl 1 to the successful bidder at the auction. The plaintiffs too seek an order of this court that the proceeds of the sale be divided equally between the plaintiffs F and the defendant as per the ancillary prayer at prayer (f) of encl 1 which must, by necessity, be read with the case of *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156, a decision of Salleh Abas FJ, and which decision was vigorously applied in the case of *Fulcrum Capital Sdn Bhd v Dato' Samsudin Abu Hassan; Rahaz Sdn Bhd & Anor (Interveners) & Another Case* [2001] 5 CLJ 73. G

Analysis

The stand of the plaintiffs may be stated as follows. That the use and benefit of the property should be equally enjoyed by the plaintiffs as well as the H defendant. Currently, however, it is only the defendant and his family members who are enjoying the property by their occupation thereof. As alluded to earlier, the parties are quite elderly and they have families of their own. The first plaintiff is currently residing at No 3, Jalan SS21/5, Damansara Utama with his family members while the second plaintiff is currently residing in Australia with his daughter. Thus, it was next to I impossible for the plaintiffs to move in and stay in the property as suggested by the defendant. Moreover, the defendant has denied entry to the plaintiffs.

The defendant continues to stay at the property but refuses to pay rental for the $^{2}/_{12}$ shares of the plaintiffs. What then should be the best way to resolve the impasse? In my considered view, it is just and equitable that the property be sold by public auction and the proceeds be divided equally among the plaintiffs and the defendant. In this way, all the three brothers will benefit from their joint proprietorship of the property. It is indeed inequitable that the defendant is allowed to stay with his family members on the property without paying a single rent.

Between 1975 to 1995 there was an oral contract of tenancy between the plaintiffs and the defendant. The landlord tenant relationship has been expounded in the following cases:

(1) *Morgan d Dowding v Bissell* (1810) 3 Taunt 65 at p 67;

(2) *Doe d Pritchard v Dodd* (1833) 5 B & Ad 689 at p 693; and

(3) *Stratton v Pettit* (1855) 16 CB 420 at p 436,

and they are certainly interesting to read. In modern times, as it is the case here, the rent is quantified in monetary terms. In *Barnes v Barratt* [1970] 2 All ER 483, there was no quantification of the rent. In *Montague v Browning* [1954] 2 All ER 601, the services were quantified and they were equated to a monetary rent.

The family arrangement between the three brothers wherein the defendant stayed at the property by paying the rental at the rate of RM330 per month between 1975 and 1995 was good as it lasted. After 1995, trouble started to brew when the rental was increased and the defendant refused to pay the rental and also refused to leave the property. This culminated in the filing of the claim by the plaintiffs in the magistrate's court.

The defendant cannot be allowed to remain on the property and not paying the rent and refusing to vacate the property. Equitable principles must be brought into the picture. Principles of equity are certainly wide and elastic and they can apply to new circumstances that may arise from time to time. The plaintiffs had not taken the law into their own hands. They sought legal redress before the magistrate's court. Now, they are seeking this court to adjudicate on their application in encl 1. The maxim that he who seeks equity must do equity has been complied with by the plaintiffs (*Mayfair Trading Co Pty Ltd v Dreyer* (1958) 101 CLR. 428 at pp 450–456). Wigram VC in the case of *Hanson v Keating* (1844) 4 Hare 1 at p 5, 67 ER 537 at pp 538–539 said that the rule that he who would have equity must do equity:

> ... cannot per se decide what terms the court should impose upon the plaintiff.

but rather:

> It decides in the abstract that the court giving the plaintiff the relief to which he is entitled will do so only upon the terms of his submitting to give the defendant such corresponding rights (if any) as he also may be entitled to in respect of the subject matter of the suit; what these rights are must be determined aliunde by strict rules of law, and not by any arbitrary

A determination of the court. The rule, in short, merely raises the question what those terms (if any) should be.

Ames once stated in *Mutuality in Specific Performance* (1903) 3 Col L Rev 1 at p 12 (US) that:

> Equity will not compel specific performance by a defendant, if after
B performance the common law remedy of damages would be his sole security for the performance of the plaintiff's side of the contract.

So much for the equitable principles.

The practical way and the only way to resolve the impasse between the plaintiffs and the defendant would be to sell the property by way of a court
C order and that the sale be effected by public auction. This was done in the case of *KK Kumaran v TS Sambanthamurthi* [1996] 3 MLJ 309. It was also done in the case of *President Shoes Sdn Bhd v Macci Fashion Centre Sdn Bhd* [1998] 1 CLJ 169. And it will be done in this case.

Order 31 of the RHC reads as follows:

D 1 Power to order sale of immovable property (O 31 r 1)

Where in any cause or matter relating to any immovable property it appears necessary or expedient for the purposes of the cause or matter that the property or any part thereof should be sold, the Court may order that property or part to be sold, and any party bound by the order and in possession of that property or part, or in receipt of the rents and profits
E thereof, may be compelled to deliver up such possession or receipt to the purchaser or to such other person as the Court may direct.

The root words would be attached to the words 'it appears necessary or expedient'. Those words must be the guiding force before the court makes an order that a particular property or part of it is to be sold. It is, of course,
F ideal to read the case of *Miles v Jarvis* (No 2) (1883) 50 LT 48. It is also a requirement that the court may order a sale of the property, like the present case, whenever it is necessary for the purposes of the action. Factually speaking, the impasse between the plaintiffs and the defendant as alluded to earlier makes it 'necessary or expedient' for this court to order the property to be sold. The scope of O 31 of the RHC has been lucidly set out by
G Mohamed Dzaiddin J (as he then was) in *Malayan Banking Bhd v Zahari Bin Ahmad* [1988] 2 MLJ 135, and at p 136 of the report his Lordship had this to say:

> Incidentally, it was brought to my attention that similar applications had been made and orders for sale given under O 31 r 1. This order applies to any
H action or proceeding which relates to land and in which it is necessary or expedient to have such land or any part thereof sold. It will be observed that the power to order such sale is conferred by item 3 of the Schedule of the Courts of Judicature Act 1964. (See commentary in *Mallal's Supreme Court Practice* (2nd Ed) under 31/1/2 at p 385). In *Mallal's* at p 386, it is noted that a sale at the instance of an equitable mortgagee can be ordered under this rule
I and the learned author cited the case of *Oldham v Stringer* 51 LTNS 895; 33 WR 251. This was an action by an equitable mortgagee by deposit of deed to enforce his security against the mortgaged estate by foreclosure or sale. The defendant had borrowed from the plaintiff a sum of money and as a

> security for the repayment of that sum had given him a promissory note, and deposited with him a title deed. However, as there was no memorandum of deposit, and no written agreement by the defendant to execute a legal charge, the plaintiff proceeded under s 25(2) of the Conveyancing Act 1881 for an order for sale which was granted. It was held that the words of the sub-section were wide enough to authorize a sale, although there was no such agreement. From the short report of the case, it does not appear that the application was made under the English rule similar to our O 31. The present O 31 was taken from O 51 of the English Rules of the Supreme Court 1965 which dealt with the power of the court to order sale of real estate and which made mention of the mode of carrying out the sale, mortgage, partition when ordered by the court and power to make order for sale in debenture holders' action. It will be noted that these powers given under O 51 have now come under 'Special Provisions as to Particular Proceedings' in the 1985 Rules of the Supreme Court, eg O 87 for debenture holders' action and O 88 for charge action.

And that the phrase 'immovable property' as found in O 31 of the RHC is very wide and flexible. Under s 3 of the Interpretation Acts 1948 and 1967 (Act 388), 'immovable property' is defined as 'land and any interest in, right over or benefit arising or to arise out of land'. And under s 66 of the Interpretation Acts 1948 and 1967 (Act 388) 'immovable property' is further defined to include 'land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth'. There is a distinction between O 31 of the RHC and O 83 of the RHC that is quite obvious. Under O 83 of the RHC, the chargee must claim possession first before seeking to obtain an order for sale from the court (*Pancaran Nilam (M) Sdn Bhd v Malayan Banking Bhd and another appeal* [2000] 4 MLJ 625 at p 638; *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149 at p 151; and ss 256 and 257 of the National Land Code). Of pertinence would be the case of *Phileo Allied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor* [1999] 3 MLJ 157, where the court held that where the security documents consist of the loan agreement and the deed of assignment, and there is no title issued, the assignee may apply for an order for sale under O 31 r 1 of the RHC, and in the event such an application is made, then the court is vested with the jurisdiction to grant an order for sale.

Section 11 of the Specific Relief Act 1950 (Act 137) is alluded to in the intitulement to encl 1. There is no necessity to reproduce that section nor to comment upon it because that section does not apply to the facts at hand. Neither party is seeking specific performance.

This now brings me to s 25 of the Courts of Judicature Act 1964 (Act 91) which enacts as follows:

> Powers of the High Court.
>
> (1) Without prejudice to the generality of Article 121 of the Constitution the High Court shall in the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.

A (2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:

Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

While the Sch to s 25(2) of the Courts of Judicature Act 1964 (Act 91) reads
B as follows:

SCHEDULE
(Section 25 (2))
ADDITIONAL POWERS OF HIGH COURT

3 Partition of land.

C Power to direct a sale instead of partition in any action for partition of land; and in any cause or matter relating to land, where it appears necessary or expedient, to order the land or any part thereof to be sold, and to give all necessary and consequential directions.

Now, as presently worded, s 25(1) of the Courts of Judicature Act 1964 (Act 91) gives an unfettered jurisdiction to the High Court to deal with all
D matters vested in it immediately prior to Malaysia Day. While s 25(2) of the Courts of Judicature Act 1964 (Act 91) gives an unfettered and untrammelled jurisdiction to the High Court to exercise all the additional powers as set out in the Schedule thereto and these additional powers are certainly wide and very elastic subject only to the requirements that these additional powers shall be exercised in accordance with any written law or
E rules of court relating to the same subject matter.

To argue that the originating summons in encl 1 would prejudice the defendant's appeal to the High Court would be going too far and way off tangent. In my judgment, encl 1 as framed cannot and will not prejudice the defendant's appeal to the High Court which appeal was against the decision
F of the learned magistrate. The defendant failed to itemize the particulars as to how exactly the originating summons in encl 1 could prejudice the defendant's appeal to the High Court. That appeal was only related to the rentals that were due and payable by the defendant to the plaintiffs as well as the defendant's counterclaim pertaining to the return of the rentals paid thus far. Whereas the present originating summons in encl 1 relates to the
G plaintiffs' application for an order for sale of the property, these two are certainly distinct and different from one another. In my judgment, the defendant could still pursue with his appeal to the High Court.

In regard to the argument that the plaintiffs should move and stay in the property and enjoy their proprietorship, I have this to say. As alluded to
H earlier, the three brothers have their own families and their own lives to reckon with. The first plaintiff stays in Damansara Utama, while the second plaintiff lives in Australia. The defendant and his family members occupy the property in question. The litigation which started in 1995 until now would definitely make it impossible for the three brothers and their families to stay in the property. Imagine the deep seated animosity between the
I plaintiffs and the defendant. To stay together with their family members in the property must be held to be intolerable and unthinkable bearing in mind the squabbles which the parties are facing.

Conclusion

For all these reasons, I must make the following orders.

I granted an order in terms of prayers (a)(i), (b) and (e) of encl 1. I too gave an order that the date of the auction sale is scheduled on 24 April 2003.

I also made an order that the valuation report shall be prepared by the plaintiffs.

Further orders in the following manner were also made:

(1) That at the auction sale, all the parties — meaning the plaintiffs and the defendant, are entitled to bid for the said property.

(2) That all the procedures to effect the auction sale shall be complied with by the plaintiffs in accordance with the RHC.

(3) That the proceeds of the sale shall be distributed equally among the plaintiffs and the defendant in accordance with their share in the said property.

(4) That the reserve price is to be fixed by the learned senior assistant registrar of the High Court of Kuala Lumpur.

(5) That the parties be at liberty to apply for further directions.

Order for sale granted.

Reported by Chew Phye Aun